



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 31 | Number 4

Article 12

6-1-1953

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Recommended Citation

Wallace Ashley Jr., *Mortgages -- Mortgages to Secure Future Advances*, 31 N.C. L. REV. 504 (1953).

Available at: <http://scholarship.law.unc.edu/nclr/vol31/iss4/12>

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nant, the decision is foregone, and the liability of the lessor is clear, but *Quaere*: what result if no such covenant had been found?

In view of the implications of the present decision requiring a breach of *express* covenant to render the landlord liable for destruction of the leasehold right by sale to a bona fide purchaser, the difficulty of giving constructive notice when continued possession is impossible or contrary to the actual terms of the lease, it would seem that legislation is necessary to better protect the rights of the lessee. It is submitted that such protection could be adequately afforded by: (1) amending the Statute of Frauds³⁷ to require all leases of whatever duration to be evidenced by some writing; and (2) requiring all leases of whatever duration to be registered under our Registration Act.³⁸ Such registration would constitute constructive notice³⁹ to all purchasers of the reversion that there is an equity outstanding in the land,⁴⁰ and would thereby protect present lessees from loss of their estate without redress by the lessor's sale of it to a bona fide purchaser without notice of such interests.⁴¹

THOMAS L. YOUNG

Mortgages—Mortgages to Secure Future Advances

In the absence of a statute providing otherwise,¹ the validity of a mortgage or deed of trust to secure future advances is fully recognized today.² The common law sanctioned this type of mortgage as a useful

³⁷ N. C. GEN. STAT. § 22-2 (1943).

³⁸ N. C. GEN. STAT. § 47-18 (1943, recompiled 1950).

³⁹ *Spence v. Pottery Co.*, 185 N. C. 218, 117 S. E. 494 (1925).

⁴⁰ The requirement that all leases be registered would not be harsh, in view of the high literacy rate in our population today, and would have the positive effect of making land titles more certain, and would obviate the necessity of inspecting the property as to possession since registration alone would constitute notice of equitable claims in the form of leases outstanding.

⁴¹ It should be noted that a somewhat analogous problem has been resolved by the courts without the aid of legislation, where the record owner of land, title to which has been perfected in another by adverse possession, conveys when the owner by adverse possession is out of the land. The courts, while recognizing the impossibility of recordation of titles by adverse possession, generally hold that adverse title, once obtained is good even as against bona fide purchasers without notice.

The North Carolina Court has, in at least one case, aligned itself with this position. *Morse v. Freeman*, 157 N. C. 385, 72 S. E. 1056 (1911). *But cf.*, *Ricks v. Batchelor*, 225 N. C. 8, 33 S. E. 2d 68 (1945). For cases to the same effect from other jurisdictions, see, Note, 9 A. L. R. 2d 850 (1950).

¹ "No estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money or the performance of any other thing the obligation or liability to the payment or performance of which arises, is made or contracted after the execution and delivery of the mortgage, except as herein provided." N. H. REV. LAWS c. 261, § 3 (1942).

² *Lawrence v. Tucker*, 23 How. 14 (U. S. 1859); *Everist v. Carter*, 202 Iowa 498, 210 N. W. 559 (1926); *Toulbee v. First Nat. Bank of Jackson*, 279 Ky. 153, 130 S. W. 2d 48 (1939); *Hortman-Salmon Co. v. White*, 169 La. 1057, 123 So.

method of providing for continuous dealings and security for obligations to arise at future times. Such have been thought particularly desirable, for example, in construction loans where advances are made as the work progresses.³ They have been used as indemnities for prospective indorsements, guaranties and accommodations of commercial paper to be made by the mortgagee, and in maintaining lines of credit with the mortgagee.⁴

The device has distinct advantages to both the mortgagor and the mortgagee. It eliminates the expense to the borrower of executing later mortgages for each new advance. In addition the borrower saves in-

711 (1929); Taft v. Stoddard, 142 Mass. 545, 8 N. E. 586 (1886). Cf. *Berger v. Fuller*, 180 Ark. 372, 377, 21 S. W. 2d 419, 421 (1929) ("Mortgages of this character have been denominated 'Anaconda mortgages' and are well named thus, as by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtedness embraced and secured in the mortgage which he did not contemplate, and to extend them further than has already been done would, in our opinion, be dangerous and unwise.")

Whether or not a particular loan or advance comes within the coverage of a mortgage to secure future advances will depend on the court's interpretation of the contract between the parties. *E.g.*, in *Cotton v. First Nat. Bank*, 228 Ala. 311, 153 So. 225 (1934), debts for advances to third persons for which mortgagor was liable as surety were held not within the blanket provision of the mortgage covering additional amounts "furnished me by [mortgagee] on any account." In *Strong Hardware Co. v. Gonyow*, 105 Vt. 415, 168 Atl. 547 (1933), a note given by the mortgagor to a third person and indorsed to the mortgagee was held not to be covered by the mortgage covering "any and all other indebtedness of the said [mortgagor] to the said [mortgagees], their heirs and assigns, heretofore or hereafter contracted and represented by promissory notes or otherwise." Again, in *Lashbooks v. Hatheway*, 52 Mich. 124, 17 N. W. 723 (1883), the court construed the language of the mortgage to mean that it covered indebtednesses of the mortgagor to the assignees of the mortgagee. See also *First Bank and Trust Co. of Ottumwa v. Welch*, 219 Iowa 318, 258 N. W. 96 (1935). In that case, a husband and wife executed a promissory note to a bank and then gave a mortgage to secure it and additional sums "whether now due or hereafter accruing to said mortgagee, and all advances of money or interest or prior liens." The court held that the husband and wife had not made their interests in the real estate subject to the individual indebtednesses of either.

A recent Ohio decision has held that in order to contend that an advance is covered by a mortgage to secure future advances, the mortgagee must manifest a reliance on the mortgage. *Second Nat. Bank of Warren v. Boyle*, 155 Ohio St. 482, 99 N. E. 2d 474 (1951) (mortgagee held to rely only on a subsequent chattel mortgage). The general rule seems to be otherwise. *Northhampton Nat. Bank v. Holland*, 126 Pa. Super. 597, 190 Atl. 483 (1937). In view of the conflict, mortgagees are well-advised to make known their reliance on the mortgage.

³ *Stephens v. Ahrens*, 179 Cal. 743, 178 Pac. 863 (1919); *Nussenfeld v. Smith*, 110 Conn. 438, 148 Atl. 388 (1930); *Kentucky Lumber and Mill Work Co. v. Kentucky Title Savings Bank & Trust Co.*, 182 Ky. 244, 211 S. W. 765 (1919); *New Baltimore Loan and Savings Assoc. v. Tracey*, 142 Md. 211, 120 Atl. 441 (1923); *Whelan v. Exchange Trust Co.*, 214 Mass. 121, 100 N. E. 1095 (1913); *Creigh Sons & Co. v. Jones*, 103 Neb. 706, 173 N. W. 687 (1919).

⁴ *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881); *McDaniels v. Colvin*, 16 Vt. 300 (1844); *Ladd v. Lookout Distilling Co.*, 147 Ala. 173, 40 So. 610 (1906); *Hollan v. American Bank of Commerce & Trust Co.*, 168 Ark. 939, 272 S. W. 654 (1925); *Brown v. Los Angeles County*, 77 Cal. App. 2d 814, 176 P. 2d 753 (1947); *Weiser Loan and Trust Co. v. Comerford*, 41 Idaho 172, 238 Pac. 515 (1925). Cf. *Bagley v. Page*, 57 R. I. 186, 189 Atl. 39 (1937) (note and mortgage given by father to his daughter as security for reimbursement of expenditures made by her for his benefit during his lifetime).

terest on that part of a loan not put to immediate use. In building loans, the lender-mortgagee avoids the risk involved in handing over the full amount of the loan at a time when the property is insufficient security.

Mortgages to secure future advances usually take one of two forms:

1) The mortgage may state that it secures a present loan definite in amount, when actually no part or only a portion of the loan was advanced at the time of execution.⁵ Parol evidence is admissible to show that it was, in fact, given to secure future advances and their amounts.⁶ This overstatement of the obligation is, of course, deceptive. At least one court has found such overstatement constructively fraudulent as to subsequent encumbrancers and limited the coverage to the amount of the original outlay.⁷ In the majority of jurisdictions, however, the instrument is held valid for advances not exceeding the sum specified in the mortgage.⁸

2) The mortgage may expressly provide that it secures future advances alone or in addition to a present obligation.⁹ The amount of the advances to be made need not be limited.¹⁰ The indefiniteness as to the ultimate debt in these cases is not deemed sufficient to invalidate the instrument, although a few state statutes do require more certainty.¹¹

⁵ Herndon v. Morris, 110 Ala. 106, 20 So. 27 (1895); Temple v. Hamilton, 178 Ark. 355, 11 S. W. 2d 465 (1929); Glenn v. Bailey, 25 Tex. Civ. App. 523, 61 S. W. 959 (1901).

⁶ Bynon v. Citizen's Bank of Carbon Hill, 221 Ala. 626, 130 So. 391 (1930); Glassman v. Ficksman, 238 Mass. 580, 131 N. E. 316 (1921); Morton v. Jones, 136 Ky. 797, 125 S. W. 247 (1910); First National Bank of Raymond v. Robke, 72 Mont. 527, 235 Pac. 327 (1925). Cf. Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943) where the court held that an oral agreement for the extension of the security of a mortgage to cover additional indebtedness was not enforceable because it was a violation of the Statute of Frauds.

⁷ Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904).

⁸ See note 5 *supra*.

⁹ Thomas v. Blair, 208 Ala. 48, 93 So. 704 (1922); State Nat. Bank v. Temple Cotton Oil Co., 185 Ark. 1011, 51 S. W. 2d 980 (1932); Hamilton v. Rhodes, 72 Ark. 625, 83 S. W. 351 (1904); Buck v. Buck, 162 Cal. 300, 122 Pac. 466 (1912); Davidson v. Ivanowski, 341 Ill. App. 152, 93 N. E. 2d 139 (1950); Carey v. Herrick, 146 Wash. 283, 263 Pac. 190 (1928).

¹⁰ In Batten v. Jurist, 306 Pa. 64, 158 Atl. 557 (1932), the mortgage to secure future advances was unlimited as to time and amount. The court held it valid as against a judgment creditor whose judgment attached after the advances were made. The minority view is represented by Balch v. Chafee, 73 Conn. 318, 47 Atl. 327 (1900). The court there stated that as against subsequent encumbrancers, who may take title without other notice than that given by the land records, future advances cannot be secured by a mortgage deed which does not show any agreement to make them nor name the amount to which they may be made.

¹¹ "No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to which it is given, and the property upon which it is to take effect." GA. CODE ANN. § 67-102 (1937). Under this statute, future advances can be made if a maximum amount is stated in the instrument. In re Corbett, 248 Fed. 988 (Ga. D. C. 1918). Otherwise, no mortgage to secure future advances will be valid. Benton-Shingler Company v. Mills, 13 Ga. App. 632, 79 S. E. 755 (1913). See also MD. ANN. CODE, art. 66, § 2 (1951), Welsh v. Kuntz, 75 A. 2d 343 (Md. 1950); Baltimore High Grade Brick Co. v. Heath, 95 Md. 571, 52 Atl. 582 (1902); VT. REV. STAT. tit. 11, c. 128 § 2712 (1949).

The character of an advance, made pursuant to a mortgage to secure future advances, usually controls in determining its priority as to the intervening claim of a creditor of the mortgagor or other third party claiming under the mortgagor. If from the agreement the advances are found to be obligatory, *i.e.*, the mortgagee binds himself to make them, the mortgage will prevail over all subsequent encumbrances to the extent of all advances irrespective of whether they were made before or after the later encumbrance.¹² The courts hold that these advances constitute but a fulfillment of the contract and that each advance relates back to the date of the execution or recordation of the mortgage.¹³

It has been held that advances made by the mortgagee in order to protect his previous loans, *i.e.*, advances essential to the mortgagee's security, other than those expressly provided for in the contract, should have priority similar to that of obligatory advances.¹⁴ Since an application of this rule involves but an evaluation of a fact situation, it should not be difficult to apply.

If, on the other hand, the advances are only optional, *i.e.*, to be made in the discretion of the mortgagee, the priority problem becomes largely one of notice.¹⁵ Assuming that the subsequent encumbrancer has such notice of the prior mortgage to secure future advances as the law of the particular jurisdiction requires,¹⁶ the decisive question be-

¹² *Hance Hardware Co. v. Denbigh Hall Inc.*, 17 Del. Ch. 234, 152 Atl. 130 (1930); *Bullard v. Fender*, 140 Fla. 448, 192 So. 167 (1929); *Creigh Sons and Co. v. Jones*, 103 Neb. 706, 173 N. W. 687 (1919); *Land Title and Trust Co. v. Shoemaker*, 257 Pa. 213, 101 Atl. 335 (1917); *Blackman v. Sharp*, 23 R. I. 412, 50 Atl. 852 (1901); *Eltopia Finance Co. v. Colerby*, 126 Wash. 554, 219 Pac. 24 (1923).

¹³ *Machado v. Bank of Italy*, 67 Cal. App. 769, 228 Pac. 369 (1924) (advances binding though definite statement of the amount to be loaned was not set forth); *Chartz v. Cardelli*, 52 Nev. 1, 279 Pac. 761 (1929) (advances were both optional and obligatory); *Jolly v. Fidelity Union Trust Co.*, 15 S. W. 2d 68 (Tex. Civ. App. 1929); *Poole v. Cage*, 214 S. W. 500 (Tex. Civ. App. 1919). *Cf.* *Williams v. Whitinerville Savings Bank*, 283 Mass. 297, 186 N. E. 502 (1933) (lender-mortgagee was found to be under no obligation to continue building loan advances after default by mortgagor by failure to complete the building); *People's Nat. Bank & Trust Co. of Lynbrook v. Harkay Realty Co.*, 258 App. Div. 964, 16 N. Y. S. 2d 779 (1940) (court held a mechanic's lienor could not compel advances by the mortgagee after mortgagor in default under terms of the agreement and mortgage).

¹⁴ *Hamilton v. Rhodes*, 72 Ark. 625, 83 S. W. 351 (1904) (court stated that a mortgagee will be protected for advances on a growing crop necessary to protect his security against waste or destruction); *Cedar v. W. E. Roche Fruit Co.*, 16 Wash. 2d 652, 134 P. 2d 437 (1943) (advances were given priority even where mortgagee had actual notice of the junior mortgage).

¹⁵ Some courts have indicated that any advance, whether optional or obligatory, made pursuant to a mortgage to secure future advances is superior to all subsequent encumbrances and the notice question does not arise. *See* *Witczinski v. Everman*, 51 Miss. 841, 846 (1876).

¹⁶ Without such notice the mortgage would not prevail over subsequent parties protected by the requirement of notice. This would be true whether or not the mortgage was for future advances. *Griffith v. State Mutual Building and Loan Ass'n.*, 46 Ariz. 359, 51 P. 2d 246 (1935); *Oaks v. Weingartner*, 105 Cal. App. 2d 598, 234 P. 2d 194 (1951) (materialman's lien here inferior; with record

comes whether the mortgagee himself at the time of the making of an advance had notice of the intervening encumbrance. The majority of courts hold that intervening encumbrances of which the mortgagee has actual notice take priority over the mortgage to the extent that it secures optional advances made by the mortgagee after the notice.¹⁷ Where the notice to the mortgagee is mere record or constructive notice, only a minority defeat the mortgagee's priority with regard to advances made by him thereafter.¹⁸

An early North Carolina case seems to indicate that our court will uphold mortgages to secure future advances.¹⁹ The court, however, has had no occasion to state its attitude with regard to the form such a mortgage should take and its priority with respect to other liens.

The General Statutes Commission recently proposed that Chapter 45 relating to mortgages be amended to include a provision covering these mortgages.²⁰ While the legislation offered was not to be deemed exclusive and instruments securing future advances not conforming to the statute were left to be governed by other applicable law, the Commission did seek to establish a guide in the drafting of such instruments and, in the case of those drawn and carried out pursuant to the statute, determine their priority with regard to subsequent encumbrances. In view of the widespread use of this type of mortgage and the need for an affirmative statement of North Carolina law on the subject, the effort seemed opportune. Unfortunately, the statute was rejected by the North Carolina legislature at its last session.²¹ Similar legislation might well be considered at a future time.

WALLACE ASHLEY, JR.

notice and examination of the deed of trust for future advances, lienor failed to inquire about advances); *Berry-Beall Dry Goods Co. v. Francis*, 104 Okla. 81, 230 Pac. 496 (1924).

¹⁷ *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881); *Everist v. Carter*, 202 Iowa 498, 210 N. W. 559 (1926); *Bunker v. Barron*, 93 Me. 87, 44 Atl. 372 (1899); *Union Nat. Bank v. Melburn and Stoddard Co.*, 7 N. D. 201, 73 N. W. 527 (1897); *Elmendorf-Anthony Co. v. Dunn*, 10 Wash. 2d 29, 116 P. 2d 253 (1941). Cf. *Atkinson v. Foote*, 44 Cal. App. 149, 186 Pac. 831 (1919).

¹⁸ *Ladue v. Detroit and M. R. Co.*, 13 Mich 380 (1865); *Kuhn v. Southern Ohio Loan & Trust Co.*, 101 Ohio St. 34, 126 N. E. 820 (1920). For majority view which requires actual notice, see cases, note 17 *supra*.

¹⁹ In *Moore v. Ragland*, 74 N. C. 343, 346 (1876), the court said, "It is clear that a man may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent." The mortgage in his case placed no limit on the amount of the future debts secured, but did have a time limit in which the debts were to be contracted. In *McAdams v. Piedmont Trust Co.*, 167 N. C. 494, 83 S. E. 623 (1914), the court cited with approval a case involving a mortgage to secure future advances.

²⁰ S. B. 27, 1953 General Assembly. Liens on crops for advances were expressly excluded by the Commission. They are covered by N. C. GEN. STAT. § 44-52 *et seq.* (1943 Recomp. 1950).

²¹ The bill was passed by the Senate, but was voted down on the floor of the House of Representatives during the closing weeks of the 1953 session.